

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CRIMINAL CASE NO. 34 OF 2005

REPUBLIC PROSECUTOR

V E R S U S

AGGREY ISIAHO ACCUSED

J U D G M E N T

The accused person is charged with the offence of murder contrary to **section 203** as read with **section 204** of the **Penal Code**. The particulars of the offence are that the accused *on the 12.8.2005 at Gavudunyi village, Gisambai location of Vihiga district within Western Province, murdered WYCLIFFE ANYORE.*

Six witnesses testified for the prosecution. **PW1, ZILIBA MUHONJA ERODE** is the accused's mother. The deceased was PW1's grandchild. On the 12.8.2005 at about 1.00 p.m. she was in her house cooking and the accused went to object to her as to why she was giving food to the deceased yet the deceased was not cultivating. The accused took the deceased to the front of the house and assaulted him using an object which PW1 did not see. The deceased was beaten to death and the accused ran to the AP camp at Hamisi. PW1 also went to the AP camp. They went back with the police and found the deceased had passed on. Police went to the scene and took the body. It is PW1's evidence that the accused was sometimes hostile and she had quarreled with him before.

PW2, MATHEW GARO KHADEYA went to work at the deceased's compound on the 12.8.2005. She met PW1 at around 8.00 a.m. and she continued with her work of tending to the crops. She went back home at 1.30 p.m. While at her house she heard noise from the accused saying "mbona unanipiga namimi na kulisha".... why are you beating me yet I am the one who provides food. After about one hour PW2 saw the area assistant chief and police officers heading to the accused's home. He then saw the accused having been arrested. The accused was not drunk that day but he usually drinks. **PW3, LUKA LUDENYO** is an older brother to the accused. The deceased was their uncle. On the 12.8.2005 he got information about the death of the deceased and went home. He saw the deceased's body which had a broken hand and leg. It also had a cut on the head. Police went to the scene and took the body. On the 18.8.2005 PW3 identified the body at the mortuary for postmortem purposes.

PW4, FLORENCE KALECHI, is the mother to the deceased and a sister to the accused. On the 18.8.2005 she went to the mortuary and identified the body for postmortem purposes. **PW5 PC MARTIN LANGAT** was based at the Vihiga DC's office. He was informed by his boss about the incident and went to the scene. The report had been made at the D.O's office and the accused was already arrested and was being kept at the D.O.'s office. It is his evidence that the accused went to make a report at the D.O's office and he was arrested. They went with the accused up to the scene and found the body outside the door. The body had no visible injuries and was taken to Mbale hospital mortuary. No exhibit was found but later a panga and rungu was taken to the police station recovered from the accused's house. He did the investigation and found that the deceased had mental problems. On the material day, there was a dispute whereby the deceased was asking for food and the accused was declining to give the deceased the food. The two started fighting. The deceased sustained injuries and died. **PW6, IP JULIUS KASIWAI** went with PW5 to the scene. His evidence is similar to that of PW5.

The accused was put on his defence. In his sworn testimony, he stated that on the 12.8.2005 he was at home at about 6.00 p.m. He wanted to cook his food when police officers went and arrested him. They told him to go and assist them to carry a body. On reaching there he found the body to be that of his

uncle and he got surprised. They went up to Vihiga police station and he was put in the cells. He denied killing the deceased.

Counsel for the accused relied on his submissions which he had made after the prosecution had closed its case. The submission raises two issues. Firstly, that due to the absence of a post mortem report then the case was not proved as required. Secondly, that the prosecution case shows that there was a fight between the deceased and the accused.

The prosecution evidence shows that the deceased died on the 12.8.2005. The postmortem report was not produced to establish the cause of death. From the evidence of the prosecution witnesses, I am satisfied that indeed the deceased died. PW3, PW4 and PW5 attended the postmortem process on the deceased's body. Counsel for the accused relies on the case of **NDUNG'U VS REPUBLIC Court of Appeal Nairobi Criminal Appeal No. 171 of 1984** where the court explained the circumstances under which death can be proved without the production of medical evidence. Counsel is also relying on the case of **MOSESIAN LENAKAE VS REPUBLIC – Nakuru Criminal Case No. 46 of 2001**.

Although no postmortem was produced, there is no evidence that the deceased is still alive or that there was no such a person in the names of the deceased. The fact that the postmortem was not produced cannot disprove the other evidence to the effect that the deceased died and a postmortem was conducted on his body. The mother of the deceased testified that after the postmortem they were given the body for burial. Ignoring all that evidence and making a conclusion that the absence of the postmortem report disproves the allegation of death is tantamount to applying the law mechanically. The main question is, where is the deceased? The answer is he died, a postmortem was conducted on his body, people saw his body, the body was released to his relatives who proceeded to bury it. That is the fact which cannot be refuted.

Although the postmortem report gives the opinion of the cause of death by the doctor, the evidence on record shows that the deceased was alive and he was not physically sick on the material day. PW1 saw the deceased being taken away by the accused. The investigating officer testified that the deceased fought with the accused. It is clear therefore that the deceased was there and he was alive and sustained injuries that were inflicted by the accused. The defence evidence is to the effect that the accused was arrested while preparing his food and was told to go and assist in carrying a body. The body turned out to be that of his uncle the deceased. It is clear from the prosecution evidence that the accused went on his own to report the matter at the AP camp and was arrested. PW1 saw the accused assaulting the deceased. The defence evidence does not raise doubt on the prosecution evidence.

From the evidence of PW2 it is stated that he heard the accused complaining as to why the deceased was beating him yet he was the one providing food. PW5 the investigating officer established that there was a fight between the deceased and the accused. According to PW3 and PW5 the deceased's body had no visible injuries. It is the evidence of PW1 that she did not see the accused with any weapon. It is established that the deceased and the accused fought and the deceased succumbed to the injuries he sustained as a result of the fight. I therefore find that there was no malice aforethought on the part of the accused to kill the deceased. There is no evidence to prove that the accused had any intention of killing the deceased. However, the deceased died out of injuries sustained after the two fought. The prosecution evidence does establish that the accused caused the death of the deceased although he had no intention of killing him.

In the end, I do find that the prosecution has not proved a case of murder contrary to section 203 as read with section 204 of the Penal Code against the accused. The accused is found guilty of the lesser offence of manslaughter contrary to section 202 as read with section 205 of the Penal Code and shall be convicted accordingly.

Delivered, dated and signed at Kakamega this 18th day of February 2014

SAID J. CHITEMBWE

JUDGE